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POLICY STATEMENT AND GUIDANCE

TO: Division on Civil Rights Staff

FROM: J. Frank Vespa-Papaleo, Esq., *Director*
NJ Division on Civil Rights

DATE: November 1, 2007

RE: Witness Interviews

CC: Charles Cohen, *Acting Section Chief*
Civil Rights Section, Division of Law

It is the policy of the New Jersey Division on Civil Rights (DCR) to exclude parties' counsel from interviews of fact witnesses conducted as part of its investigation of complaints under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49 and the New Jersey Family Leave Act (FLA), N.J.S.A. 34-11:B-1 to -16. **This policy applies to interviews of present and former employees of the respondent charged with discrimination or a violation of the LAD and FLA.** DCR believes that the conduct of witness interviews without the presence of counsel is essential to the fair and thorough investigation of complaints under the LAD and the FLA.¹

Governing case law in New Jersey makes clear that DCR is under no legal obligation to permit counsel to attend such interviews. The Appellate Division has repeatedly held that there is no right to the assistance of counsel in a purely administrative investigation. See Proceeding on Initiative of Commission, 119 N.J. Super. 302, 304 (App. Div. 1972) (denial of application of license for hiring agent by Waterfront Commission based on information in investigatory interview conducted without counsel); In re Tufi, 182 N.J. Super. 631 (App. Div.), cert. denied, 91 N.J. 189 (1982) (an applicant for a casino employee license not permitted to have counsel present at a deposition); Greer v. N.J. Bureau of Securities, 291 N.J. Super. 365, 372 (App. Div. 1994) (witness who is subpoenaed to testify in an investigatory proceeding of Bureau of Securities has no right to counsel). Thus, it is clear that the witnesses DCR interviews as part of an

¹DCR recognizes that in certain cases there may be special circumstances that would warrant an exception to this policy.



investigation of claims under the LAD or FLA have no right to have counsel present during these purely investigatory interviews.

As a courtesy, DCR may allow the respondent's counsel to attend a witness interview if the witness is a member of the respondent's litigation control group. Such an exception is consistent with the rules of professional responsibility governing representation by an attorney when the client is an organization. RPC 1.13 (a) provides that "the organization's lawyer shall be deemed to represent not only the organizational entity but also the members of the litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter..., however that 'significant involvement' requires involvement greater than the supplying of factual information or data respecting the matter." As a matter of agency policy, however, interviews will be conducted without counsel. Should counsel seek authorization to participate in an interview with a member of the litigation control group, counsel must make the request in writing to the Director.

Therefore, as a general rule, DCR will conduct witness interviews without the presence of counsel. In the Director's discretion, and only upon written request by respondent counsel, DCR may allow counsel for the respondent to attend when the witness is a member of the respondent's litigation control group. In his discretion, the Director may also allow a witness to have counsel present during an interview so long as the attorney does not represent any other party in the proceedings.

Any questions regarding this policy should be addressed to Deputy Director Gary LoCassio of the Bureau of Policy at gary.locassio@njcivilrights.org or at (609) 984-7091.